

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

* * * * *

*
*
*
*
*
*
*
*
*
*

Board of Appeals Case No. S-2855
(OZAH Case No. 13-04)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

PAGE

I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND	3
A. The Subject Property and the Neighborhood.....	3
B. Proposed Use	6
C. Neighborhood Response	12
D. The Master Plan	12
III. SUMMARY OF HEARING	13
IV. FINDINGS AND CONCLUSIONS	14
A. Standard for Evaluation	15
B. General Conditions	17
C. Specific Standards.....	21
D. Additional Applicable Standards	28
V. RECOMMENDATION	28

I. STATEMENT OF THE CASE

Petition No. S-2855, filed on July 20, 2012, by G. Ethan Taylor and Michael D. Cavey, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to allow an accessory apartment in the cellar¹ of a one-family, detached home at 8822 First Avenue, Silver Spring, Maryland, on land in the R-60 Zone. The property's legal description is Lot P26, Block 8 of the Woodside Subdivision (0027). The tax account number is 13-01090120, and the property is listed as an historical resource in the Woodside Locational Atlas Historic District (#36/4).

The Hearing was scheduled for December 6, 2012, by corrected notice dated October 2, 2012 (Exhibit 13).

Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued November 16, 2012, recommended approval of the special exception, with conditions. Exhibit 15.²

The Department of Housing and Community Affairs (DHCA) inspected the property on November 16, 2012. Housing Code Inspector Robert Goff reported his findings in a memorandum dated November 20, 2012 (Exhibit 16). The inspector's preliminary report specified that the accessory apartment has 386 square feet of habitable space, permitting an occupancy of up to two unrelated people or a family of up to three. DHCA also submitted a memorandum from Ada DeJesus indicating that there are no other active accessory apartments in the neighborhood.³

A public hearing was convened on December 6, 2012, as scheduled, and Petitioners G. Ethan Taylor and Michael D. Cavey appeared *pro se*. Also testifying was Inspector Robert Goff of the Department of Housing and Community Affairs. Petitioners executed an affidavit of posting (Exhibit 18) and promised to file a copy of their deed, which they submitted later that day, after the hearing

¹ Technical Staff referred to the location as the basement level of the home (Exhibit 15, p. 5), but the Housing Code Inspector referred to it as the cellar. Exhibit 16.

² The Technical Staff report is frequently quoted and paraphrased herein.

³ Ms. DeJesus listed one revoked accessory apartment in the area, and one active registered living unit.

(Exhibit 19). They adopted the findings in the Technical Staff Report (Exhibit 15) and in the Housing Code Inspector's Report (Exhibit 16), as Petitioners' own evidence. Tr. 5-6. They also agreed to meet all the conditions set forth in both reports. Tr. 6.

The record was held open at the end of the hearing till December 17, 2012, to await the filing of the transcript and a copy of Petitioners' deed. It closed on that date.

There has been no input from the community on this case, and there is no opposition to this special exception petition. The petition meets all of the statutory criteria, and the Hearing Examiner therefore recommends that the petition be granted, with conditions specified in Part V of this report.

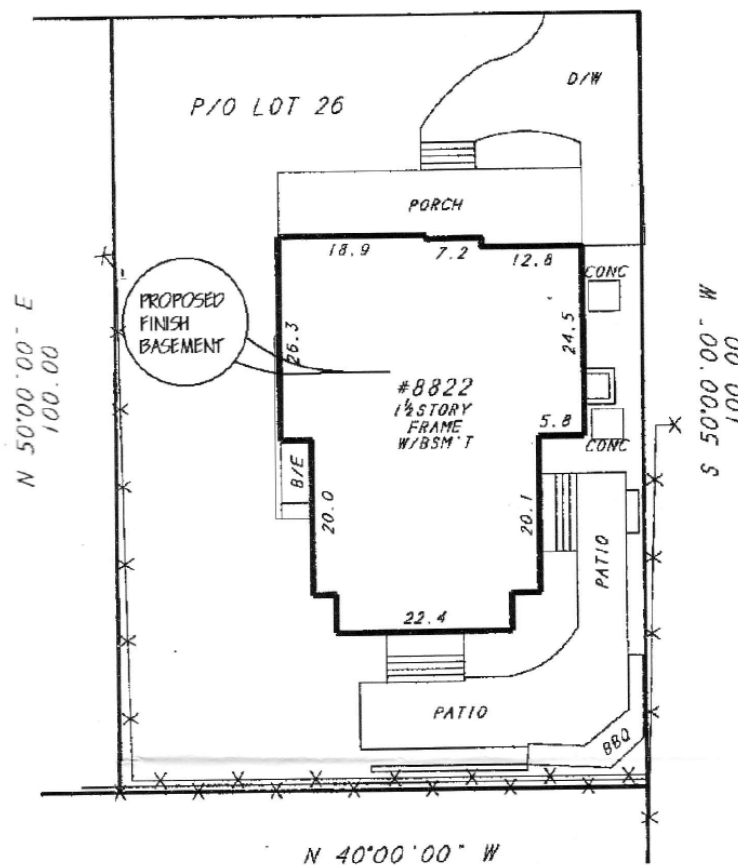
II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property is located at 8822 First Avenue, Silver Spring, Maryland, in the Woodside Subdivision. It is about one block west of Georgia Avenue and about 100 feet south of the intersection of Noyes Drive and First Avenue. The home is in the R-60 Zone, on a 6,750 square-foot lot, and it is depicted below in a photograph from the Technical Staff report (Exhibit 15, p. 3).



View of the Front of the Home from First Avenue



The subject property contains approximately 6,750 square feet of land and is rectangular in shape. It is located approximately 100 feet south of the intersection of Noyes Drive and First Avenue. The property is classified under the R-60 Zone in the North and West Silver Spring Master Plan (2000). The existing dwelling unit was constructed in 1937; is 1 ½ stories in height, and contains approximately 2,938 square feet. The house is located on a well maintained and carefully landscaped lot in the Woodside subdivision. Entrance to the main dwelling unit is from a brick walkway adjacent to First Avenue. Residential parking by permit is allowed on both sides of First Avenue. . . .

Technical Staff also noted that the subject property “is a historical resource in the Woodside Locational Atlas Historic District (#36/4).” However, because there will be no alterations to the exterior of this resource, “[t]he subject application would have no direct impact on resources identified in the Locational Atlas and Historic Preservation Staff recommends approval of this application.” Exhibit 15, p. 6.

Technical Staff defined the general neighborhood as bounded by Sixteenth Street to the north, Georgia Avenue to the east, Spring Street to the south and Second Avenue to the west. Exhibit 15, p. 3. Though it extends a bit far to the north, the Hearing Examiner accepts this neighborhood definition, and it is shown below on a map supplied by Technical Staff (Ex. 15, p. 4):



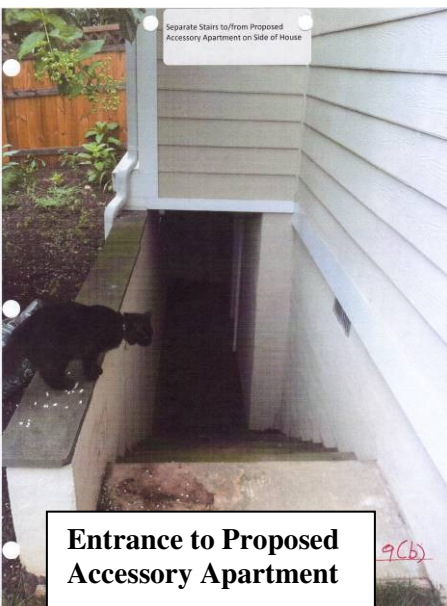
According to Technical Staff, the neighborhood boundary is drawn to include properties that may be affected by a potential increase in density or traffic. Staff described the neighborhood:

. . . The majority of the neighborhood consists of one-family dwelling units zoned R-60. The neighborhood also contains several institutional uses and a local park also zoned R-60. These uses located on the west side of Georgia Avenue between Highland Drive and Spring Street are: First Church of Christ Scientist, Woodside United Methodist Church, offices of the Montgomery Department of Health and Human Services in the Silver Spring Center, and Woodside Local Park. There is one existing townhouse development along the west side of Georgia Avenue between Highland Drive and Noyes Drive, which is zoned RT-12.5. The other townhouse development located on the west side of Georgia Avenue south of Grace Church Road is also zoned RT-12.5. . . .

Technical Staff also mentions that two other accessory apartments were approved within the neighborhood boundaries, S-999 (Sweeny) and S-2692 (Maury). The Hearing Examiner takes official notice of the Board of Appeals records, which indicate that S-999 was revoked by the Board on May 26, 2005, based on abandonment. It appears that S-2692 still exists, although DHCA does not mention it in Ms. DeJesus's memo on the subject. Exhibit 17.

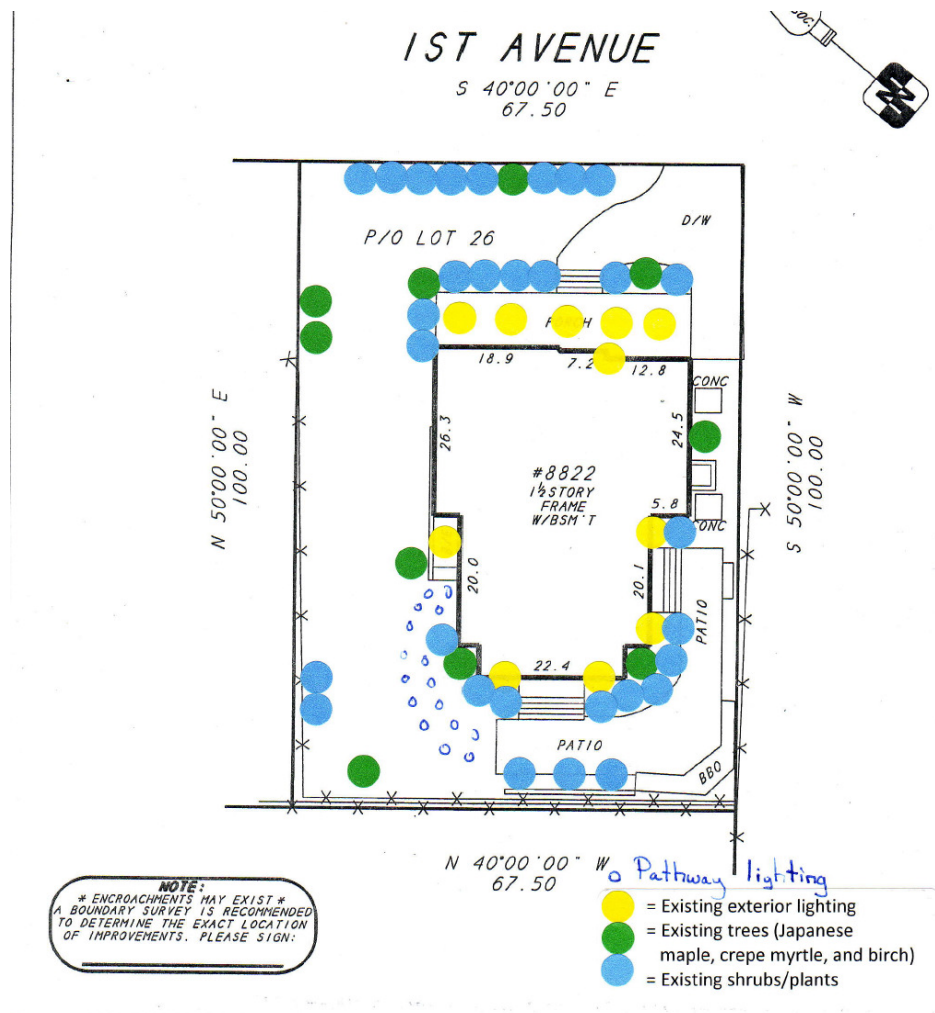
B. The Proposed Use

The Petitioners are seeking a special exception to allow an accessory apartment of about 492 square feet in the cellar of their existing home. A separate entrance to the apartment is located at the northwest corner of the house and is distinct from the entrance to the main dwelling, as shown in the photograph below (Exhibit 9(b)). The access walkway is depicted on the right (Exhibit 15, p. 6):

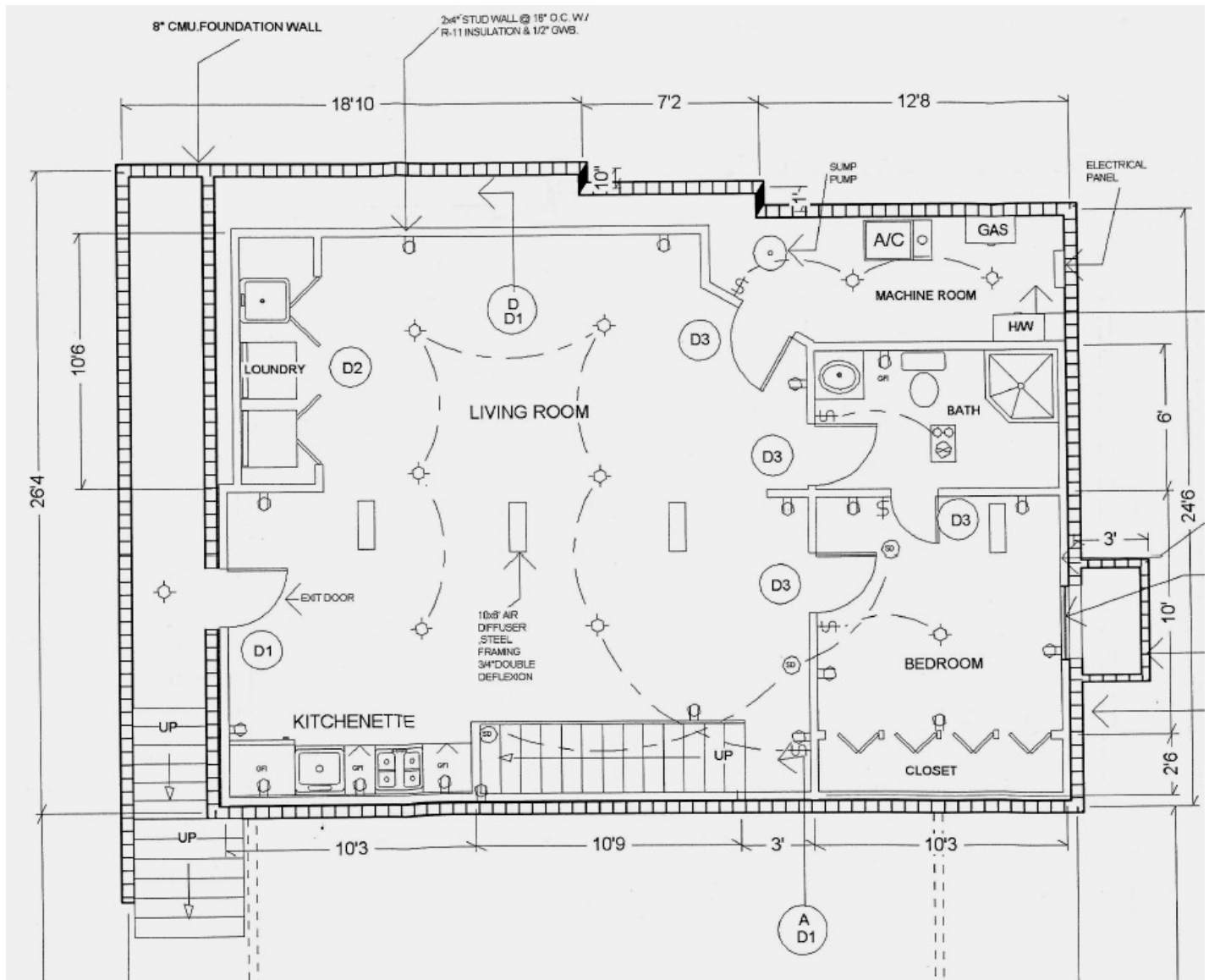


The brick walkway leads from the driveway to the enclosed rear yard and across the yard to steps that lead down to the apartment's entrance. Lights have been added to the walkway at the suggestion of the Housing Code Inspector to improve safety. All lighting is residential in nature. Tr. 12-14. Technical Staff reports that the proposed use has the appearance of a typical rear entry into a one-family home, and the accessory apartment entrance will not detract from the appearance of the neighborhood. Adequate lighting, residential in character, is located adjacent to the apartment's entrance door. Exhibit 15, p. 5.

According to Technical Staff, landscaping on site is well maintained and the property contains several medium sized trees in good health. No new plantings are proposed under the application. "There are no landscaping or environmental issues associated with this application." Exhibit 15, p. 7. The Landscape and Lighting Plan (Exhibit 6) is reproduced below:



The overall net floor area of the apartment is approximately 443 square feet,⁴ 386 square feet of which is habitable, and it includes a living room, a bedroom, a kitchenette, a bathroom and a laundry, as shown on the Floor Plan (Exhibit 5), reproduced below:



Petitioners supplied photographs of some of the rooms in the accessory apartment (Exhibit 9(i)), and they are reproduced on the next page:

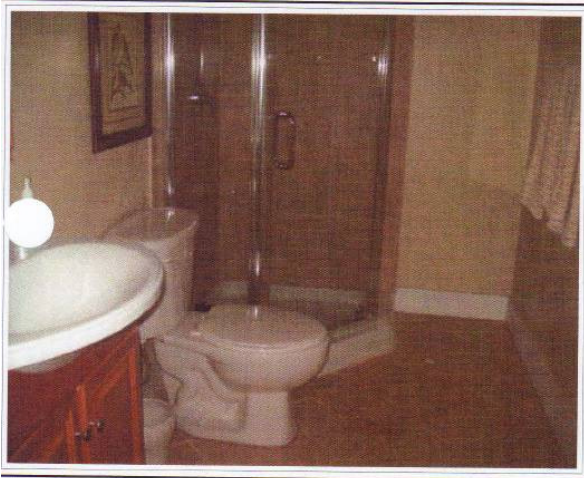
⁴ Petitioners estimated the overall area of the accessory apartment as 492 square feet on their Floor Plan (Exhibit 5). The Hearing Examiner has here used DHCA's estimate of 443 square feet, 386 square feet of which is habitable.



Basement with Fireplace



Basement



Basement-Bathroom



Basement

The Department of Housing and Community Affairs (DHCA) inspected the property on November 16, 2012. Housing Code Inspector Robert Goff reported his findings in a memorandum dated November 20, 2012 (Exhibit 16). The substance of his report is set forth below:

The preliminary inspection was conducted on 11-16-2012. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Install egress window in bedroom. Window must be 5 sq feet net opening and be no more than 44" from floor to window opening
2. Install GFCI outlets in kitchen

3. Install HVAC vent cover in hall ceiling
4. Paint kitchen ceiling
5. Paint living room ceiling
6. Replace keyed dead bolt lock with thumb turn lock on main door
7. The driveway will accommodate 2 cars
8. There is off street parking and permit is needed
9. There is 386 sq feet of habitable space. The total sq feet of the Accessory Apartment is 443. 2 people can live in the unit or a family of 3.

Mr. Goff testified that “It’s a very nice unit,” and assuming the required modifications he listed in his memo are made, there is no reason for the special exception to be disapproved. Tr. 29-31. Mr. Goff also stated that he checked with the “Historical Society,” and determined that the lighting added to the stone path does not violate any historical area prohibitions because it is not permanently affixed to the structure. Tr. 19.

Technical Staff discussed transportation issues at page 7 of their report (Exhibit 15), stating:

The proposed accessory apartment meets the requirements of the Adequate Public Facilities (APF) test. The proposed accessory apartment will not have an adverse effect on the transportation network in the immediate area. The existing one-family dwelling on the property is estimated to generate one peak-hour trip during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak periods. The proposed accessory apartment is estimated to generate one additional peak-hour trip during the weekday peak periods using trip generation rates included in the *Local Area Transportation Review (LATR)/Policy Area Mobility Review (PAMR) Guidelines*,

Transit services in the area include Ride-On Bus Route 4 that provides service on Second Avenue between Kensington and the Silver Spring Metro Station. Several Metrobus routes provide service along Georgia Avenue with bus stops located approximately 650 feet from the property.

In the immediate vicinity of the property, sidewalks exist along the east side of First Avenue, across from the property, and along the south side of Noyes Drive approximately 100 feet south of the site, and along both sides of Georgia Avenue. The proposed use will not have an adverse effect on pedestrian access or safety in the area. Finally, the driveway for the existing one family dwelling can accommodate two parked vehicles. On-street parking is permitted on both sides of First Avenue, but requires a parking permit between 8:00 a.m. and 5:00 p.m., Monday through Friday. With the permitted on-street parking, the proposed special exception use will not have an adverse effect on parking in the neighborhood.

There is no other evidence in the case regarding traffic. As to parking, Petitioners confirmed that there is permit parking on the street and that they have a driveway which will hold up to two cars. Since they have two of their own cars, they intend to get a residential parking sticker for the tenant. Petitioners indicated that there is ample parking available on the street near their home. Tr. 14-18. The availability of sufficient on-street parking was confirmed by Technical Staff (Exhibit 15, p. 10), as well as by the Housing Code Inspector. Tr. 30. The Hearing Examiner has recommended a condition in Part V of this report requiring Petitioners to obtain a residential parking sticker permitting on-street parking by the tenant. The following photograph of First Avenue looking towards Noyes Drive, which was submitted by Petitioners as part of Exhibit 9(d), supports the evidence that parking is not an issue in the neighborhood.



Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities, and that there is adequate parking to accommodate both the owners and the accessory apartment tenant. Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects on the neighborhood.

C. Neighborhood Response

There has been no input from the community on this case, and there is no opposition to this special exception petition.

D. The Master Plan

Petitioner's property is subject to the *2000 North and West Silver Spring Master Plan*, the intent of which is "to preserve the existing residential character and to reinforce the many desirable features of the North and West Silver Spring neighborhoods." Master Plan, p. 15. Accessory apartments can augment the range of housing choices without negatively impacting the character of residential neighborhoods.

The subject property is zoned R-60 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-60 Zone. In discussing Special Exceptions (pages 42-43), the Master Plan's recommendation is to maintain a residential appearance and minimize traffic generation.

As stated by Technical Staff (Exhibit 15, p. 6), the subject special exception "is consistent with the master plan recommendations." Staff also noted that the subject property was not recommended for any changes by the Master Plan, which reconfirmed the R-60 zoning for the subject site.

The Hearing Examiner finds that the proposed accessory apartment does nothing to reduce the residential character of the neighborhood, and traffic generation will be minimal. The subject house is historically notable, and the proposed use would do nothing to compromise its historic integrity. Exhibit 15, p. 6. Thus, it is fair to say that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the *2000 North and West Silver Spring Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioners, G. Ethan Taylor and Michael D. Cavey, and from Housing Code Inspector Robert Goff. There was no opposition.

Petitioners G. Ethan Taylor and Michael D. Cavey (Tr. 5-28; 33):

Petitioners executed an affidavit of posting (Exhibit 18), and promised to submit a copy of their deed (Exhibit 19). They adopted the findings in the Technical Staff Report (Exhibit 15) and in the Housing Code Inspector's Report (Exhibit 16), as Petitioners' own evidence. Tr. 5-6. They also agreed to meet all the conditions set forth in both reports. Tr. 6.

Petitioners testified that they would file a copy of their deed shortly after the hearing, and the Hearing Examiner indicated he would keep the record open to receive it. Tr. 9-10. They identified their plans in the file, and modified the Landscape and Lighting Plan (Exhibit 6) to show the lighting alongside the brick walkway to the accessory apartment that they added at the suggestion of the Housing Code Inspector. Tr. 11-13. They also confirmed that all of the lighting, both the original lighting and the pathway lighting that they added, are residential style lights. Tr. 13. Moreover, they believe the added lighting does not violate any historical area prohibitions. They are very dim, and in a fenced-in back yard. Tr. 18-19.

Petitioners confirmed that there is permit parking on the street and that they have a driveway which will hold up to two cars. Since they have two of their own cars, they intend to get a residential parking sticker for the tenant. Petitioners indicated that there is ample parking available on the street near their home. Tr. 14-18.

Petitioners identified the photographs of their home included in Exhibit 9, as well as the ones in the Technical Staff report (Exhibit 15). Tr. 19-28, 33.

Housing Code Inspector Robert Goff (Tr. 19, 29-33):

Housing Code Inspector, Robert Goff, testified that he inspected the premises on November

16, 2012, and that his findings are set forth in his report of November, 2012 (Exhibit 16), which he repeated at the hearing. Tr. 29-33. Mr. Goff further testified that most of the items listed are probably already fixed, because they were in the process of doing so when he inspected. He stated that “It’s a very nice unit,” and assuming the required modifications he listed in his memo are made, there is no reason for the special exception to be disapproved. Tr. 29-31. Mr. Goff did not observe any problem with parking availability on the street during his visits. Tr. 30.

Mr. Goff also stated that he checked with the “Historical Society,” and determined that the lighting added to the stone path does not violate any historical area prohibitions because it is not permanently affixed to the structure. Tr. 19.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 15).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 15, p. 9):

- 1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall;
- (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions;

- (3) a separate entrance and walkway and sufficient exterior lighting;
- (4) sufficient parking;
- (5) the existence of an another household on the site with resulting additional activity including greater use of outdoor space and more pedestrian, traffic, and parking activity; and
- (6) the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found (Exhibit 15, pp. 9-10):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is not identifiable from the street. The apartment will provide space and facilities necessary for an apartment use.

The accessory unit has its own separate entrance apart from the rest of the house. The apartment entrance appears typical of a rear entrance to a one-family house, as such it is difficult to distinguish it from any other neighborhood home. The entrance of the accessory apartment will be illuminated consistent with typical residential standards.

On-street parking is permitted on both sides of First Avenue between 8:00 a.m. and 5:00 p.m., Monday through Friday with a residential parking permit. Adequate on street parking exists in the vicinity of this property with a residential permit. With a parking permit, the accessory apartment's future tenant will not create an adverse impact to existing parking conditions in the defined neighborhood.

Based on these findings, Staff concluded (Exhibit 15, p. 10):

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff's assessment, except to note that the historical nature of the area is a non-inherent site characteristic. However, the Hearing Examiner finds that this unusual site condition will not lead to any adverse effects on the neighborhood, given the indoor

nature of the proposed use and the fact that no exterior changes to the structure are proposed.

Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner

concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in the record and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(a).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part IV. C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or

the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject property is covered by the *North and West Silver Spring Master Plan*, approved and adopted in 2000. Technical Staff reports that the subject property was not recommended for any changes by the Master Plan, which reconfirmed the R-60 zoning for the subject site. For the reasons set forth in Part II. D. of this report, the Hearing Examiner finds that the subject application is consistent with the Master Plan's recommendations.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment is located in an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There is sufficient parking to accommodate both the owners and the tenants. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There is only one other active accessory apartment in the defined neighborhood, and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that, “Based on the nature of the use, the proposed special exception will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 15, p. 12. The Hearing Examiner finds that because the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: According to Technical Staff, the two⁵ other homes with accessory apartments in the area are not distinguishable from the other residences; nor will this one be. Exhibit 15, p. 12. For the reasons discussed above, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the residential nature of the area.

⁵ As previously mentioned, Technical Staff found two other accessory apartments in the neighborhood, but the Hearing Examiner’s examination of Board of Appeals’ records reveals that one of them had been revoked.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 15, p. 13), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special

exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 15, p. 7. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 15, p. 13.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 15), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*
- (i) The lot is 2 acres or more in size; and*
 - (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the cellar of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment is located in an existing dwelling.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1937. Exhibit 15, p. 15. It therefore meets the “5 year old” requirement.

(5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The Hearing Examiner finds that the proposed use does not violate any of the provisions of this subsection; however, some explanation is needed. Subsection (5)(i) prohibits an accessory apartment on a lot “[t]hat is occupied by a family of unrelated persons.” Petitioners indicated in their letter to the Board of Appeals of July 17, 2012, that they are “domestic partner[s].” Exhibit 3. The legislative history of Subsection (5)(i), of which the Hearing Examiner takes official notice, leads the Hearing Examiner to conclude that the Council, in enacting this provision, did not intend to preclude non-married co-owners from establishing an accessory apartment.

When the statutory language was proposed as part of Zoning Text Amendment 89013, the Executive Director of the Human Relations Commission, Alan P. Dean, sent a June 12, 1989 memorandum to the Council Staff warning that the new language, if used to prevent an unmarried couple from obtaining an accessory apartment special exception, “could amount to marital status discrimination,” prohibited by the Montgomery County Human Rights Act, Code §27-11.⁶ At the public Council hearing on ZTA 89013, which took place on June 13, 1989, the former Director of Housing and Community Affairs, Mr. Ferrara, responded to the Human Rights Commission memo, testifying that “It was not

⁶ Mr. Dean referred to §27-11 as prohibiting to discrimination in real estate; however, that section actually pertains to discrimination in public accommodations. §27-12 prohibits discrimination in real estate. Both sections stand for the proposition that County policy prohibits discrimination on the basis of marital status.

the intent [of the proposed ZTA] to say that two unmarried people could not live in a house and have an accessory apartment. It has to do with the numbers more than anything.” *Pages 15-16 of Council Hearing transcript.*

In other words, the ZTA language was intended to prohibit a large number of unrelated people living together in a house from obtaining an accessory apartment. Mr. Ferrara suggested that the confusion could be clarified with a language change, but the Council did not do so, and thus we still have the confusing language in the Code. Nevertheless, the Hearing Examiner finds that the legislative intent not to discriminate on the basis of marital status is sufficiently evidenced both by the Montgomery County Human Rights Act, itself, and by the quoted discussion surrounding passage of the ZTA in question here.

The Hearing Examiner therefore concludes that Subsection (5)(i) was not intended to preclude an unmarried couple from obtaining an accessory apartment special exception, and that Petitioners therefore comply with the terms of subsection (5)(i). The proposed use will not violate any of the provisions of this subsection.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: Access to the accessory apartment will preserve the appearance of a one-family dwelling. The apartment entrance will be separate from the main entrance and substantially screened. As noted by Technical Staff, the apartment entrance will have the appearance of a typical rear entry to a one-family home. Exhibit 15, p. 15. There will thus be no change to the home’s residential appearance.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: The only external modification or improvement proposed by Petitioners is the addition of lights along the walkway to the accessory apartment, already added at the suggestion of the Housing Code Inspector. The lights are residential in character and located in an area screened by a backyard fence. They therefore will not reduce compatibility with the neighborhood.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment, at 443 square feet, 386 square feet of which is habitable, is under the maximum of 1,200 square feet. It will also clearly be subordinate to the main dwelling, which according to Technical Staff, has a total floor area of 2,938 square feet. Exhibit 15, p. 16.

59-G § 2.00(b) Ownership Requirements

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners will live in the main dwelling unit on the property.

(2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: According to Petitioners' deed (Exhibit 19), Petitioners purchased the property in December of 2009. The one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioners are the co-owners of the property. Exhibits 12 and 19.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is approximately 6,750 square feet in size, and therefore satisfies this requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the zone. Exhibit 15, p. 8. The following table from the Technical Staff report summarizes the relevant development standards for the application. Exhibit 15, p. 8.

Development Standards for the R-60 Zone

Development Standards	Min/Max Required	Proposed	Applicable Zoning Ordinance Provisions
Minimum Lot Area	6,000 sq ft	6,750 sq ft	§59-C-1.322 (a)
Minimum Lot width at street line	25 ft	68 ft	§59-C-1322 (b)
Minimum lot width at front bldg line	60 ft	68 ft	§59-C-1322 (b)
Minimum Setbacks			
- front	25 ft	29 ft	§59-C-1.323
- side	8/18 ft	8/18 ft	§59-C-1.323
- rear	20 ft	20 ft.	§59-C-1.323
Maximum Building Height	35 ft	35 ±ft	§59-C-1.327
Maximum Building coverage	35%	17 %	§59-C-1.328
Maximum Floor area for accessory apartment	1,200 sq ft	500 sq ft	§59-G-2.00 (a) (9)

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: As previously stated in this report, there is only one other approved and existing accessory apartment in the defined neighborhood. The Hearing Examiner finds that the proposed special exception will not create an excessive concentration of similar uses. Technical Staff reached the same conclusion even though it assumed the existence of two other accessory apartment in the defined neighborhood. Ex. 15, p. 17.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: As discussed in Part II.B. of this report, there are two off-street spaces on Petitioners' driveway. Moreover, there is ample on-street parking available on First Avenue, adjacent to Petitioners' home. The availability of sufficient on-street parking was confirmed by Technical Staff (Exhibit 15, p. 10), as well as by the Housing Code Inspector. Tr. 30. The Hearing Examiner has recommended a condition providing that "Petitioners must obtain a residential parking permit sticker allowing the accessory apartment tenants to park on the street in the neighborhood."

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 16) specifies certain conditions. Petitioners have agreed to meet all conditions, and will comply with directives of the Housing Code Inspector. Tr. 5-6.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that the Petition of G. Ethan Taylor and Michael D. Cavey, BOA No. S-2855, which seeks a special exception for an accessory apartment to be located at 8822 First Avenue, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must comply with the conditions set forth in the Memorandum of Robert Goff, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 16):
 - a. Install egress window in bedroom. Window must be 5 sq feet net opening and be no more than 44" from floor to window opening
 - b. Install GFCI outlets in kitchen
 - c. Install HVAC vent cover in hall ceiling
 - d. Paint kitchen ceiling

- e. Paint living room ceiling
 - f. Replace keyed dead bolt lock with thumb turn lock on main door
 - g. The driveway will accommodate 2 cars
 - h. There is off street parking and permit is needed
 - i. There is 386 sq feet of habitable space. The total sq feet of the Accessory Apartment is 443. 2 people can live in the unit or a family of 3.
- 3. Petitioners must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment (up to two persons or a family of three) and must comply with any other directions of the Housing Code Inspector to ensure safe and code-compliant occupancy;
 - 4. Petitioners must obtain a residential parking permit sticker allowing the accessory apartment tenants to park on the street in the neighborhood;
 - 5. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
 - 6. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
 - 7. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: January 11, 2013

Respectfully submitted,



Martin L. Grossman
Hearing Examiner